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1501 K STREET, N.W.
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TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

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WRITER'S DIRECT NUMBER
(202) 736-8132

WRITER'S E-MAIL ADDRESS
pkeisler@sidley.com

November 29, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards, CC Docket Nos. 96-115 and 96-149

Dear Ms. Salas:

On behalf of AT&T Corp. ("AT&T"), this *ex parte* letter responds to the comments of the Competition Policy Institute ("CPI") regarding carrier use of customer proprietary network information ("CPNI").

Because of an apparent misfiling by CPI, AT&T was unaware of CPI's comments until after the time for filing reply comments had expired. Pursuant to the Commission's Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247 ("Notice"), CPI was supposed to file its electronic submission under CC Docket No. 96-115 (not CC Docket No. 96-149) and to send a hard copy of its comments to Qualex International, the Commission's copy contractor. *See* Notice at ¶¶ 30, 33. It appears that CPI failed to comply with these requirements. CPI filed its electronic submission under Docket 96-149 (not 96-115); and according to Qualex, the contractor still has not received CPI's submission. In any event, because neither Qualex nor ITS, Inc., transmitted a copy of CPI's comments to AT&T before November 16, 2001, AT&T was unable to respond to CPI in its reply comments. AT&T therefore takes this opportunity to address CPI's arguments.

According to CPI, an opt-in regime is the only approach that safeguards the privacy of telecommunications customers. *See* CPI at 2. CPI does not, however, offer any meaningful evidence to support this bald assertion. Instead, CPI merely cites sources showing that customers of *financial institutions* are not reading or not responding to their opt-out notices. *See id.* at 5. These sources are unpersuasive for multiple reasons.

First, none of the studies demonstrates that an opt-out mechanism has been unsuccessful in protecting the privacy of financial information. CPI alleges – without any supporting evidence – that financial customers' failure to respond to opt-out notices "strongly suggests" that these notices are ineffective. But CPI is sorely mistaken. An equally, if not more, plausible inference is that financial customers do not respond to the notices because the customers simply do not care if their information is disclosed. Although CPI "decline[s] to accept this view," CPI at 5, it offers no basis other than its own unsubstantiated opinion. Moreover, the American Bankers Association's study – upon which CPI expressly relies, *see id.* – undercuts CPI's position. According to the study, 83% of financial customers agreed that their banks do a good job of protecting the confidentiality of customers' information. *See id.* (Attachment A). CPI ignores this evidence, which shows that an overwhelming majority of financial consumers feel that the current opt-out system has adequately protected their privacy.

Second, even if CPI demonstrated that an opt-out regime has been unsuccessful in protecting the privacy of financial information, CPI presents no evidence that opt-out has been problematic in the context of the telecommunications industry. CPI does not cite a single complaint of any customer whose carrier has used an opt-out mechanism since the Tenth Circuit's decision in *US West* v. *Federal Communications Commission*, 182 F.3d 1224 (10th Cir. 1999). CPI would like the Commission to think that, if an opt-out mechanism has been ineffective in ensuring financial privacy, it will also be insufficient to protect the privacy of CPNI. However, as the United States Telecom Association ("USTA") and the Verizon telephone companies ("Verizon") explained in their reply comments, there is no justification for simply assuming that the two contexts are the same. *See* USTA at 3 ("It would be an inappropriate leap for the Commission to extrapolate from the concerns raised about opt-out in the context of [the Gramm-Leach-Bliley Act] and apply them in the context of Section 222 . . . . Context is very important."); Verizon at 8 ("[The opt-in proponents] provide no evidence whatsoever that the opt-out notices that were used for more than a decade for CPE and enhanced services were inadequate or failed to enable customers to make an informed choice[,] or provide any examples from the *telecommunications* industry. Instead, they claim that certain notices used in another industry, financial services, were 'unintelligible.'"). In the context of the financial industry, there have been "documented problems of identify theft." Direct Marketing Association at 5 (initial comments). Consequently, there is a greater need to secure the privacy of financial information than to secure the privacy of CPNI, *see id.*, and there is more reason to suspect privacy-related complaints from financial customers than from telecommunications customers. Moreover, in the context of the telecommunications industry, there is no evidence that carriers have been disrespectful of privacy concerns by mailing unintelligible opt-out notices.

Third, even if telecommunications carriers were to attempt to use opt-out notices that failed to inform customers of their privacy rights, the narrowly tailored response is to require better notices, not to prohibit opt-out altogether. As WorldCom, Inc. ("WorldCom") explained in its reply comments, "[p]roper notification rules, and enforcement of those rules, will ensure

that the opt-out mechanism protects [a] consumer's privacy interests." WorldCom at 3-4; *see also* Verizon at 8 ("[T]he remedy for unintelligible notices is not to require opt-in or to adopt detailed regulations but to ensure that the notices are properly framed."). "So long as the notices include the information the Commission has already specified, and so long as the carrier provides one or more of the convenient means of opting out that the Commission has adopted, there should be no concern that customers are unable to make an informed choice." Verizon at 8-9. It is thus no surprise that the opt-in proponents "have neither provided evidence of complaints regarding the notices sent out by the telecommunications industry nor demonstrated their insufficiency."[1] WorldCom at 4.

Finally, even if CPI's sources did suggest that an opt-out system is inherently flawed in every industry irrespective of the content and form of the notice, CPI's position must still fail. As AT&T demonstrated in both its initial comments (at 2-3), and its reply comments (at 3-4), the unambiguous text of section 222 requires the Commission to permit opt-out approval. Section 222(f) confirms that, when Congress wants to mandate express customer consent, it indicates as much by using the word "express." Because section 222(c)(1) does not speak of "express approval," such approval is not necessary. None of the opt-in proponents has offered any challenge to AT&T's statutory construction.[2]

Respectfully yours,

Peter D. Keisler

[1] CPI argues in the alternative that, if the Commission permits opt-out, the Commission should specify the exact form and wording of the opt-out notification. *See* CPI at 8. However, because there is absolutely no evidence in the record that telecommunications carriers' current opt-out notices are insufficient, there is no rationale for imposing more stringent requirements.

[2] Indeed, CPI pays no respect to the statutory text. CPI argues that, if the Commission permits opt-out at all, it should "modify its definitions" and segregate the most sensitive information (such as data describing how telecommunications services are used) for opt-out treatment. CPI at 6. Nothing in section 222, however, suggests that the word "approval" can mean two different things, depending on context. As Verizon points out, "[t]he Act . . . does not make any distinction among types of CPNI but, instead, includes in the definition of CPNI both information on the customer's service configurations and on usage of the services." Verizon at 9. Moreover, CPI's proposal has nothing to recommend it. The proposal suffers from the same evidentiary infirmities as any broad-based opt-in requirement. CPI has presented no evidence showing that an opt-out mechanism cannot protect the confidentiality of CPNI.